

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

<b>IN RE:</b>	)	
	)	
<b>SENTINEL TRUST COMPANY</b>	)	<b>Sup. Ct. No. M2005-00031-SC-R11-CV</b>
	)	
	)	<b>Ct. App. No. M2005-00031-COA-R3-CV</b>
	)	
	)	<b>Lewis County Chancery No. 4781</b>

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**ANSWER OF APPELLEES ACTING COMMISSIONER-IN-POSSESSION  
GREG GONZALES AND RECEIVERSHIP MANAGEMENT, INC.,  
RECEIVER FOR SENTINEL TRUST COMPANY, IN OPPOSITION TO  
APPLICATION FOR PERMISSION TO APPEAL**

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## **INTRODUCTION**

Appellee, the Commissioner of the Tennessee Department of Financial Institutions and Receivership Management, Inc., Receiver for Sentinel Trust Company, file this Answer in Opposition to Appellants' Application for Permission to Appeal, pursuant to Rule 11, Tennessee Rules of Appellate Procedure, from the decision of the Tennessee Court of Appeals, affirming two orders entered by the Lewis County Chancery Court approving the transfer of certain fiduciary positions held by Sentinel Trust Company, in liquidation, to successor fiduciaries, pursuant to Tenn. Code Ann. § 45-2-1504. The Court of Appeals specifically found that the Lewis County Chancery Court had clear statutory authority to enter these orders approving the transfers. The orders, which were entered on November 15 and December 1, 2004, were certified as final appealable orders pursuant to Tenn.R.Civ.P. 54.02.

The record in this case, as transmitted by the Appellants, contains ten (10) volumes of the technical record, which shall be referred to as "T.R."; three volumes of transcripts of hearings before the Lewis County Chancery Court, which shall be referred to as "T.E."; and one volume of exhibits, which shall be referred to as "Exh."

## **ISSUE PRESENTED FOR REVIEW**

1. Whether the Court of Appeals correctly found that the trial court had subject-matter jurisdiction to enter the orders approving the transfers of Sentinel's fiduciary positions to successor fiduciaries?

## **STATEMENT OF THE CASE**

This case was instituted on May 18, 2004, when Appellee Kevin P. Lavender, Commissioner of the Tennessee Department of Financial Institutions (“Commissioner”), took emergency possession of Sentinel Trust Company (“Sentinel”), a state-chartered trust company, and filed such Notice of Possession with the Lewis County Chancery, pursuant to Tenn. Code Ann. §§ 45-2-1502(b)(1) and (c)(1).<sup>1</sup> The Notice stated that the Commissioner had found: (1) that Sentinel had used pooled fiduciary funds, that were to be held in trust for certain bond issues, to provide operating capital for non-related defaulted bond issues, thereby creating a fiduciary cash shortfall that greatly exceeded Sentinel’s current operating capital and, (2) that Sentinel had failed to reconcile fiduciary cash and corporate cash accounts in a timely and accurate fashion and had otherwise failed to keep accurate books and records.<sup>2</sup> The Commissioner further found that Sentinel's potential liability for the cash shortfall in the pooled fiduciary account exceeded its current capital level and that Sentinel has been unable to provide a viable capital plan that would eliminate the deficiency and make the account whole.<sup>3</sup> Accordingly, the Commissioner found that the following grounds for possession, as set forth in Tenn. Code Ann. § 45-2-1502(a),

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<sup>1</sup>T.R. Vol. I, 1-4.

<sup>2</sup>*Id.*

<sup>3</sup>*Id.*

existed: (1) Sentinel's business was being conducted in an unsound manner and (2) Sentinel was unable to continue normal operations.<sup>4</sup>

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<sup>4</sup>*Id.*

That same day, the Commissioner also issued an order appointing Appellee, Receivership Management, Inc., to act as the Receiver of Sentinel (“Receiver”), pursuant to Tenn. Code Ann. § 45-2-1502(b)(2).<sup>5</sup> On June 15, 2004, the Receiver and Department personnel issued a preliminary report (“the Report”) on the fiduciary and corporate financial positions of Sentinel, based upon a review of Sentinel’s own records.<sup>6</sup> Those records reflected, as set forth in the Report, that Sentinel had a cash deficiency or shortfall in the pooled fiduciary account<sup>7</sup> that ranged from \$7,612,218.00 to \$8,430,722.00.<sup>8</sup> The Report also reflected that, as of May 18, 2004, Sentinel had total corporate assets of \$1,389,682. Thus, taking into account the cash deficiency in the pooled fiduciary account (which is reflected as an accounts payable), the Report determined that Sentinel was insolvent in an amount of at least \$6,225,445 as of May 18, 2004.<sup>9</sup>

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<sup>5</sup>T.R. Vol. I, 4.

<sup>6</sup>T.R. Vol. I, 84-99.

<sup>7</sup>The pooled fiduciary account is a Sentinel account held at SunTrust Bank, in which funds were deposited, in trust, by bond issue borrowers and/or issuers for payment of principal and interest and other matters associated with the particular bond issue. The funds in that account were co-mingled by Appellants and were withdrawn by them for purposes other than for what the funds were deposited.

<sup>8</sup>*Id.* at 92-93.

<sup>9</sup>*Id.* at 94. This insolvency does not include the \$559,873 in bond principal and interest checks discussed, *supra*, which increases the fiduciary cash deficiency, and would increase the insolvency by a corresponding amount.

Based upon the findings contained in the Report and the record as a whole, the Commissioner determined that liquidation of Sentinel in accordance with the provisions of Tenn. Code Ann. §§ 45-2-1502(c)(2) and 1504 was necessary and appropriate. Accordingly, on June 18, 2004, the Commissioner issued a Notice of Liquidation of Sentinel Trust Company, which was filed with the Lewis County Chancery Court.<sup>10</sup> Thereafter, the Commissioner, through his appointed Receiver, began the process of liquidating Sentinel Trust Company, in accordance with the directives of Tenn. Code Ann. § 45-2-1504. In accordance with the specific mandates of Tenn. Code Ann. § 45-2-1504(c), which requires the Commissioner to terminate all fiduciary positions held by Sentinel as soon as practicable, the Receiver sought first to transfer the trustee and/or executor positions that Sentinel held on three small personal trust accounts to new trustees/executor. A motion seeking the Lewis County Chancery Court's approval to transfer Sentinel's fiduciary positions on these accounts to new fiduciaries, as well all of the verified investments assets separately held by Sentinel on behalf of those accounts, was filed on July 2, 2004.<sup>11</sup> Appellants did not object to the transfer of Sentinel's fiduciary positions on these three personal trust accounts, or to the transfer of the investment assets separately held by Sentinel for

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<sup>10</sup>T.R., Vol. I, 70-74.

<sup>11</sup>T.R., Vol. II, 144-152.

the benefit of those accounts, and an agreed order approving these transfers was entered by the court on July 19, 2004.<sup>12</sup>

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<sup>12</sup>T.R., Vol. II, 249-252. General objections to the transfer of the investment assets of the three personal trusts were raised by parties other than the Appellants. As a result of those objections, the court allowed discovery to be had on the limited issue of the statements contained in the affidavit of Vivian Lamb, a trust examiner with the Department of Financial Institutions, and provided that the order approving transfer of the personal trusts was subject to amendment upon the conclusion of that discovery. A motion to amend was subsequently filed on August 2, 2004 (T.R., Vol., IV, 446-452), but was denied in an order entered on August 23, 2004. (T.R., Vol. VI, 710-711).



The Receiver then sought to transfer Sentinel's fiduciary positions on the remaining bond issues. On November 4, 2004, the Commissioner and Receiver filed a motion seeking approval of transfer of the fiduciary positions<sup>13</sup> currently held by Sentinel on all of the bond accounts not in default, and on four defaulted bond accounts, to successor fiduciaries.<sup>14</sup> Specifically, the motion sought approval of the following transfers:

- 92 non-defaulted bond issues and one defaulted bond issue to SunTrust Financial Services
- 11 non-defaulted bond issues and three defaulted bond issues to Bank of Oklahoma
- 6 non-defaulted bond issues to Wachovia Bank
- 7 non-defaulted bond issues to Deutsche Bank
- 1 non-defaulted bond issue to Huntington National Bank.<sup>15</sup>

The motion further requested, among other things, that the court establish December 15, 2004. as the date upon which Sentinel, in Liquidation, ceased to be the fiduciary for these bond issues without the necessity of any consent or approval by a bond issuer and/or a borrower.

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<sup>13</sup>Sentinel Trust Company served as indentured trustee, paying agent, transfer agent, and/or registrar, dependent on the type of bond issue. All of these positions are included in the term "fiduciary positions."

<sup>14</sup>T.R.Vol. VII, 889-927.

<sup>15</sup>T.R., Vol. VII, 913-919.

Objections to this motion to transfer were filed by the Appellants on November 12, 2004.<sup>16</sup> Appellants' main objection was that the Lewis County Chancery Court lacked subject matter jurisdiction to approve the transfer of the bond issues to successor fiduciaries. This objection was based primarily upon their belief and contention that the liquidation provisions contained in Tenn. Code Ann. § 45-2-1504 applied only to state banks, not trust companies, and, therefore, neither the Commissioner nor the court had any authority to transfer Sentinel's fiduciary positions on its bond accounts to successor fiduciaries.<sup>17</sup>

A hearing on the motion and objections was held on November 15, 2004.<sup>18</sup> At the hearing, counsel for the Receiver notified the court that the Receiver had been contacted by nine bond issuers that desired to be transferred to Bank of Oklahoma, rather than SunTrust Financial Services; one defaulted bond issue that desired to stay with the Receiver and not be transferred to SunTrust; and, one defaulted bond that wanted to be transferred from the Receiver to the Bank of Oklahoma.<sup>19</sup> As such, counsel orally amended the motion to remove those bond issues from the motion and to provide that the parties would have until December 1, 2004, in which to announce or otherwise have heard any matters regarding the disposition of the fiduciary positions as to those bond issues. The court granted all the relief sought in the motion, as amended, and the

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<sup>16</sup>T.R., Vol. VIII, 978-1132. Certain objections were also filed by Chancellor Health, one of the bond issuers, on the day of the hearing. Chancellor Health did not raise any objections to the transfer of the bond accounts to successor trustees, but instead, objected to some of the other relief requested, in particular, the amount of fees owed to Sentinel. *See* T.E., Vol. III, 52-58.

<sup>17</sup>T.R. Vol. VIII, 984-986.

<sup>18</sup>T.E., Vol. III.

<sup>19</sup>T.E., Vol. III 21-24.

order was entered on November 15, 2004.<sup>20</sup> Additionally, the court found that there was no reason or just cause for delay and certified the order as a final, appealable order, pursuant to Tenn.R.Civ.P. 54.<sup>21</sup>

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<sup>20</sup>T.R., Vol. IX 1133-1195.

<sup>21</sup>*Id.* at 1139.

Subsequently, on November 24, 2004, the Receiver filed an announcement informing the court that the parties had agreed to transfer of the fiduciary positions on the bond issues that had been reserved from the November 15, 2004 order, and requested entry of a final order approving of such transfers pursuant to Tenn.R.Civ.P. 54.<sup>22</sup> An order granting that request was entered by the court on December 1, 2004.<sup>23</sup>

Appellants timely filed their notice of appeal on December 10, 2004.<sup>24</sup> The notice stated that Appellants were appealing “from the final judgment entered by this Court on November 15, 2004, in the matter as styled above and from each and every final judgment so entered and designated as such by the Court since November 15, 2004.”<sup>25</sup> Appellants did not, however, seek a stay of the November 15 order, or any subsequent final orders.

The Court of Appeals issued its Opinion and Judgment on December 29, 2005, affirming the orders of the trial court approving the transfer of Sentinel’s fiduciary positions on these bond accounts to successor trustees. Appellants timely filed their Application for Permission to Appeal to this Court on February 24, 2006.

### **STATEMENT OF RELEVANT FACTS**

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<sup>22</sup>T.R., Vol. X 1227-1231.

<sup>23</sup>*Id.* at 1240-1244. The court also entered two separate orders approving the transfer of two municipal bond issues to Deutsche Bank, wherein the bond issuers had previously requested such transfer. (T.R., Vol. X, 1248-1255).

<sup>24</sup>T.R., Vol. X 1264-65.

<sup>25</sup>*Id.*

The relevant facts are set forth in the Opinion and Judgment of the Court of Appeals entered on December 29, 2005, a copy of which is attached hereto and incorporated herein by this reference.

### **ARGUMENT**

In determining whether to grant permission to appeal, Rule 11 of the Rules of Appellate Procedure lists the following factors, which neither fully control nor fully measure the Court's discretion, but indicate the character of reasons that will be considered:

1. The need to secure uniformity of decision;
2. The need to secure settlement of important questions of law;
3. The need to secure settlement of questions of public interest; and
4. The need for the exercise of the Supreme Court's supervisory authority.

Other than simply reciting these factors and asserting that the Court of Appeals' decision was in error, Appellants' Application presents no reason as to why this Court should exercise its discretion and grant permission to appeal from the final decision of the Court of Appeals. The decision of the Tennessee Court of Appeals affirming the chancery court's orders approving the transfer of Sentinel's fiduciary positions on various bond accounts to successor fiduciaries was entirely correct, however, and Appellants have simply presented no grounds to warrant review of that decision.

Appellants argue that the Tennessee Banking Act simply does not give the Lewis County Chancery Court jurisdiction "to permit or forbid the transfer of trust assets," including the

removal and appointment of substitute trustees, and that the orders approving the transfer of Sentinel's fiduciary positions were void for lack of jurisdiction.<sup>26</sup>

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<sup>26</sup>Appellants' brief at 38.

Subject matter jurisdiction involves a court’s lawful authority to adjudicate a particular controversy brought before it.<sup>27</sup> It involves the nature of the cause of action and relief sought. Tennessee’s courts derive subject matter jurisdiction from the state constitution or from legislative acts.<sup>28</sup> Courts may not exercise jurisdictional powers that have not been conferred on them directly or by necessary implication.<sup>29</sup> However, “[j]urisdiction carries with it [the] power to determine every issue or question properly arising in the case.”<sup>30</sup>

Here the court’s authority is governed by certain provisions of the Tennessee Banking Act, Tenn. Code Ann. §§ 45-2-1502 and 1504, which authorize the Commissioner of Financial Institutions to take possession of troubled state financial institutions and to either reorganize or

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<sup>27</sup>*State v. Cawood*, 134 S.W.3d 159, 163 (Tenn. 2003) *as revised* (2004) and *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004) (citing *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000)).

<sup>28</sup>*Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 639 (Tenn. 1996); *Kane v. Kane*, 547 S.W.2d 559, 560 (Tenn. 1977).

<sup>29</sup>*See First Am. Trust Co. v. Franklin-Murray Dev. Co.*, 59 S.W.2d 135, 140 (Tenn.Ct.App. 2001); *Dishmon v. Shelby State Cmty. Coll.*, 15 S.W.3d 477, 480 (Tenn.Ct.App. 1999).

<sup>30</sup>*Stinson v. State*, 208 Tenn. 159, 344 S.W.2d 369, 373 (1961) (quoting *Carver v. Anthony*, 35 Tenn.App. 306, 245 S.W.2d 422, 424 (1951)).

liquidate them.<sup>31</sup> The statutes require the Commissioner, upon taking possession of a financial institution, to file a copy of the notice of possession in a court of general or equity jurisdiction in the county in which the institution is located, thereby vesting that court with jurisdiction over the *in rem* receivership proceeding.<sup>32</sup>

Once the Commissioner determines to liquidate a financial institution, such liquidation is governed by the provisions of Tenn. Code Ann. § 45-2-1504. Under subsection (a), the Commissioner is required to obtain the approval of the court in which the notice of possession has been filed, in order to do any of the following:

- (1) *Sell any asset of the organization having a value in excess of five hundred dollars (\$500);*
- (2) Compromise or release any claim if the amount of the claim exceeds five hundred dollars (\$500), exclusive of interest; or
- (3) Make any payment on any claim, other than a claim upon an obligation incurred by the commissioner, before preparing and filing a schedule of the commissioner's determinations in accordance with this chapter. (Emphasis added).

Subsection (c) further mandates that the Commissioner take the following action:

*As soon after the commencement of liquidation as is practicable, the commissioner shall take the necessary steps to terminate all fiduciary positions held by the state bank and take such action as may be necessary to surrender all property held by the bank as a*

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<sup>31</sup> Although these statutes speak in terms of a "state bank," they are made applicable to state trust companies pursuant to Tenn. Code Ann. § 45-1-124(b).

<sup>32</sup> Tenn. Code Ann. § 45-2-1502(b)(1). *See In re Possession and Control of the Commissioner of Banks and Real Estate*, 764 N.E.2d 66, 88 (Ill.App. 2001) (receiverships and liquidation have been held to be *in rem* proceedings) and *Moody v. State*, 487 So.2d 852, 854 (Ala. 1986) (receivership proceeding is an *in rem* or *quasi in rem* proceeding).



*fiduciary and to settle its fiduciary accounts.* Such fiduciary accounts may be transferred by the commissioner to another qualified corporate fiduciary as determined by the commissioner, and notice of such transfer must be given by registered mail to the parties by the transferee corporate fiduciary. (emphasis added).

Appellants argue that because this subsection (c) does not specifically require court approval in the termination of fiduciary positions, the chancery court had no authority or jurisdiction to approve the transfer of Sentinel’s fiduciary positions to successor trustees. Both the trial court and Court of Appeals rejected this argument, however, finding that clear statutory authority to enter orders approving the transfers existed in Tenn. Code Ann. § 45-2-1504(a)(1). That subsection specifically requires the court’s approval before the Commissioner may sell *any asset of the organization with a value in excess of \$500*. The Court of Appeals found, and Appellants do not dispute, that in transferring Sentinel’s fiduciary positions to successor trustees, the Commissioner also transferred Sentinel’s right to receive trustee administration fees, paying agent fees, and other fees and expenses — fees that Appellants themselves had characterized as a valuable asset of Sentinel “having a reasonable value to it in excess of \$4 million.”<sup>33</sup>

As Tenn. Code Ann. § 45-2-1504(a)(1) specifically required court approval before the Commissioner could sell any asset of Sentinel with a value in excess of \$500, the Court of Appeals correctly found that the trial court had clear statutory authority and subject-matter jurisdiction to enter the orders approving Sentinel’s fiduciary positions on the bond accounts to successor fiduciaries.

## **CONCLUSION**

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<sup>33</sup>Appellants’ brief at 3 and 38. *See also* T.R. Vol. IX, 983; T.E. XIII, 50.

For these reasons, Appellees respectfully request that this Court deny Appellants' Application for Permission to Appeal.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Response has been sent by first class U.S. Mail, postage prepaid, to:

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this \_\_\_\_\_ day of March, 2006.

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